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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE STATE OF CALIFORNIA, et al. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

Petitioner asks the Court to limit the discretion of police officers in performing one of the most dangerous parts of their job: the service and execution of a search warrant. The service of a warrant on a residence that has been determined by a neutral and detached magistrate as likely to harbor evidence of a crime can be expected to provoke a less-than-enthusiastic response from its

occupants. For that reason, the best method of approaching a house to execute a warrant, whether openly or by stealth, by ruse or by surprise, depends peculiarly on the experience, knowledge, and hunches of the officer, whose life, after all, is at stake. These decisions must be made on the scene, usually within a matter of moments, and require split-second correction or modification.

Amici states have a direct and substantial interest in insuring that law enforcement officers have as a matter of law the discretion necessary to protect their own lives in the performance of their duties. Some *amici* have statutes that govern the method by which the police may gain entry to a dwelling (Pet.Br., App. A); some have adopted rules by common-law adjudication (Pet.Br., App. B); and still others leave such decisions to the officers at the scene (Pet.Br., App. D). Yet, *all* of the states joined herein agree that the federal Constitution does not compel the exclusion of evidence that is lawfully seized merely on the ground that the officers failed to announce their identity and purpose prior to entering the place to be searched.

SUMMARY OF ARGUMENT

The pistol, narcotics, and other paraphernalia found in Petitioner's home were seized during a search authorized by a concededly lawful search warrant. Prior to the search, the police observed the occupants through the screen door, simultaneously identified themselves, stated they had a search warrant, and entered Petitioner's home to execute the warrant. J.A. 41-42. Even if (as

Petitioner contends) this method of entry were illegal, she nonetheless cannot obtain any relief in this proceeding. The Constitution does not require exclusion of evidence seized under the authority of a lawful warrant, even if the entry to execute the warrant was not preceded by an announcement.

When the police make a warrantless illegal entry and only later obtain a search warrant, the warrant is deemed an "independent source" for evidence seized during its execution, so long as the warrant was based on information acquired prior to the entry. *Murray v. United States*, 487 U.S. 533 (1988); *Segura v. United States*, 468 U.S. 796 (1984). A fortiori, when the initial entry is supported by a warrant yet is not preceded by an announcement, the warrant remains an "independent source" for evidence discovered during its execution. Moreover, even if the officers had complied with a hypothetical knock-and-announce requirement, the warrant would have authorized them to conduct the search they did, rendering the evidence admissible under the "inevitable-discovery" doctrine as well. *Nix v. Williams*, 467 U.S. 431 (1984).

Where the police have a warrant that authorizes entry and a search, the exclusionary rule cannot be effective in deterring unannounced entries. Either an announced *or* unannounced entry, depending on the circumstances, can pose a danger for an officer executing a warrant. A rational officer with a search warrant would choose to enter unannounced only if necessary to protect officer safety or to avoid the destruction of

evidence—both of which, Petitioner concedes, justify an unannounced entry under the Constitution. (Pet.Br. 63.) The exclusionary rule is neither a necessary nor useful remedy for those infrequent situations in which a reviewing court may in hindsight disagree with the choice made by the officer.

Thus, the Court should affirm the judgment below, if not on the ground urged by respondent, then on the ground that is the focus of this amicus brief: that the exclusionary rule does not require the suppression of evidence seized pursuant to a valid warrant solely because entry was not preceded by an announcement. Relying on the latter ground accords with the "well-settled doctrine of this Court" of avoiding constitutional questions where there is some other ground on which to dispose of the case. *See Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 211 (1960).

ARGUMENT

I. THE EXCLUSIONARY RULE SHOULD NOT BE EXTENDED TO EVIDENCE SEIZED DURING THE EXECUTION OF A VALID, UNTAINTED SEARCH WARRANT AS A SANCTION FOR AN ANTECEDENT UNANNOUNCED ENTRY

The police seized a semi-automatic pistol, a quantity of methamphetamine, and other drug paraphernalia supporting Petitioner's convictions during the execution of a lawful search warrant supported by probable cause. Neither the validity of the warrant nor the scope of the search is at issue in the petition. Rather, Petitioner argues only that the way the police entered her home—i.e., by identifying themselves as having a warrant, through the screen door, simultaneously with their entry—violated the Fourth Amendment and rendered the subsequent search invalid.

Respondent believes that the existence of a valid warrant, supported by probable cause, exhausts the Fourth Amendment inquiry. Whether the police announce their identity and purpose as they enter or seconds prior to entering should not render unconstitutional a search authorized by a valid warrant.

However, the judgment below should be affirmed without reaching the constitutional question. Even if the Court were to find that the method of entering a house to execute a warrant is subject to Fourth Amendment

scrutiny, contraband seized under the authority of a valid search warrant is admissible under the "independent-source" and "inevitable-discovery" exceptions to the exclusionary rule. The rule, which is a "pragmatic" remedy, *Stone v. Powell*, 428 U.S. 465, 488 (1976), should not be extended to bar the admission of evidence that could have been seized—and, in fact, *was* seized—under the authority of a valid search warrant.

Disposing of the case on the alternate ground set forth in this brief accords with the well-settled prudential doctrine of avoiding the unnecessary resolution of difficult constitutional questions, which "carries a special weight in maintaining proper harmony in federal-state relations." *See Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 211-212 (1960). The applicability of the exclusionary rule, which is not itself compelled by the Constitution, *United States v. Calandra*, 414 U.S. 338, 348 (1974), presents a purely legal question that can be addressed by this Court without the benefit of lower court analysis. *See United States v. Locke*, 471 U.S. 84, 92 n.9, 93 (1985).

A. A Valid Search Warrant, Supported By Probable Cause, Provides An "Independent Source" For The Discovery Of Evidence Seized During Its Execution, Notwithstanding A Prior Unannounced Entry

The Court has invoked the exclusionary rule to suppress both the direct and the indirect products of a Fourth Amendment violation. *Murray v. United States*, 487 U.S. 533, 536-537 (1988); *Wong Sun v. United States*, 371 U.S. 471, 484-485 (1963). In either case, suppression is

appropriate only if, at a minimum, "the challenged evidence is in some sense the product of illegal governmental activity." *United States v. Crews*, 445 U.S. 463, 471 (1980). The test for determining whether evidence is the product or "fruit" of a prior illegality is whether "the illegality is at least the 'but for' cause of the discovery of the evidence." *Segura v. United States*, 468 U.S. 796, 815 (1984).

In this case, the search warrant—not the unannounced entry—was the "but-for" cause. Or, to put it another way, the same search would have ensued even if the officers had announced their entry. The existence of a valid warrant, which was sought and issued on the basis of information developed prior to any illegal entry, thus provided an "independent source" for evidence seized during its execution. *Murray*, 487 U.S. at 541; *Segura*, 468 U.S. at 799. Here, as in *Segura* and *Murray*, the relationship between the illegal entry and the subsequent search consisted solely of the fact that the former preceded the latter in time. As *Murray* and *Segura* held, this is insufficient to establish legal causation.

In *Segura*, the police developed probable cause to believe that evidence would be found at the defendant's residence and decided to obtain a warrant. Prior to securing the warrant, however, the officers arrested Segura, made an illegal, warrantless entry into his apartment, and conducted an unjustified protective sweep of the premises, apparently to prevent the destruction of evidence. Nineteen hours later, when the warrant was issued, the police searched the apartment. 468 U.S. at

800-801. Segura (like Petitioner) claimed that the evidence seized after the illegal entry and occupation of the premises should have been excluded as the fruit of the illegality. *Id.* at 813. The Court squarely rejected this theory of causation:

> Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. . . . [¶] None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged.

Id. at 813-814.[1/]

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1. The dissent agreed that evidence discovered and seized during a warrant-authorized search should not be suppressed unless the illegal entry was the "but-for"

Four years later, in *Murray*, the Court revisited the issue of whether evidence seized under a lawful warrant could be the fruit of an antecedent illegal entry. The police made a forcible, warrantless, and illegal entry into a warehouse where the defendant had recently been seen and found numerous burlap-wrapped bales of marijuana in plain view. The police then exited the warehouse, kept it under surveillance, and did not reenter until they had obtained a warrant, eight hours later. 487 U.S. at 535-536. Murray attempted to distinguish *Segura* by pointing out that the bales of marijuana, unlike the evidence seized in *Segura*, had been observed during the officers' initial illegal entry. The Court again rejected a purely temporal theory of causation:

> Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if the later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. . . . [¶] The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents'

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cause of the seizure. *Id.* at 827, 829-830 (Stevens, J., dissenting) ("causation is a necessary but not a sufficient condition for exclusion").

> decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id. at 541-542 (footnote omitted).

Evidence seized under a valid warrant following an unannounced entry is a far more attractive candidate for application of the independent-source doctrine than the evidence seized after warrantless entries in *Murray* and *Segura*. *See, e.g., United States v. Marts*, 986 F.2d 1216, 1221 (8th Cir. 1993) (Fagg, J., dissenting). Not only was the information supporting the warrant "wholly unconnected with the entry and . . . known to the agents well before the initial entry," *Segura*, 468 U.S. at 814, but the *warrant itself*, which was obtained before any illegal entry, is likewise unconnected to it. Indeed, the existence of the warrant at the time of the entry dispels the *Murray* dissenters' concern that "[i]t normally will be difficult for the trial court to verify, or the defendant to rebut, an assertion by officers that they always intended to obtain a warrant, regardless of the results of the illegal search." 487 U.S. at 547 (Marshall, J., dissenting).

A contrary rule would have perverse consequences. If the police are permitted to rely on the independent-source doctrine for warrantless illegal entries but not for illegal entries supported by a warrant, they will be discouraged from using the warrant procedure. Instead, a cautious officer would choose to make a warrantless,

unannounced entry, secure the premises, and then return with a warrant to conduct a search—turning the Fourth Amendment's "strong preference for warrants," *United States v. Leon*, 468 U.S. 897, 914 (1984), on its head.

In addition, exclusion of evidence based solely on an unannounced entry, despite the existence of a valid search warrant, would violate a cardinal tenet of this Court's Fourth Amendment jurisprudence: that the police not be put in a worse position than if the violation had not occurred. *Murray*, 487 U.S. at 541; *Nix v. Williams*, 467 U.S. 431, 443 (1984); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). The mere existence of an illegality preceding the execution of a warrant should not render the evidence thereby seized inadmissible unless the illegality is causally related to the seizure. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 43-44 n.3 (1984); *McGuire v. United States*, 273 U.S. 95, 99 (1926) ("A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule"). Under this Court's well-established case law on causation, the exclusionary rule cannot be applied here.

B. Evidence Seized During The Warrant-Search Would Inevitably Have Been Discovered Had An Unannounced Entry Not Occurred

Even if the evidence seized in accordance with the warrant is deemed to be a fruit of the earlier unannounced entry, it is nonetheless admissible under the inevitable-discovery doctrine. The inevitable-discovery doctrine, like the independent-source exception, "ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct." *Nix v. Williams*, 467 U.S. 431, 443 (1984). When the challenged evidence has an independent source, exclusion puts the police in a worse position than would have occurred in the absence of any error or violation. Likewise, when the evidence would inevitably have been discovered, exclusion puts the government in a worse position, "because the police would have obtained that evidence if no misconduct had taken place." *Id.* at pp. 443-444.

In *Nix*, the defendant was arrested for the murder of a young girl. Her body was the subject of a county-wide search but had not yet been found. The arresting officers, in a manner the Court found to violate the Sixth Amendment, elicited from the defendant a statement of the victim's location. Based on that statement, the police recovered the body before the search party reached the site. Although the defendant's statement was suppressed as a fruit of the Sixth Amendment violation, the Court held that the evidence concerning the discovery of the body, which was a fruit of the same violation, was

admissible at trial because the body would inevitably have been discovered by the search party. *Id.* at 448.

Here, it is undisputed that the officers had a valid warrant that permitted at least this much: entry into Petitioner's home, after an announcement of their identity and purpose, and a search of the premises. Thus, had the unannounced entry not occurred, the police still would have entered the home and discovered the contraband. Suppression of the evidence would put the police in a worse position than would have occurred in the absence of the violation. And, unlike other applications of the inevitable-discovery doctrine, the conclusion that the evidence in this case would inevitably have been discovered requires neither speculation nor a leap of faith but is established to a certainty by the fact of the warrant. *Compare id.* at 459-460 (Brennan, J., dissenting).

The sole circumstance in which evidence seized after an unannounced entry might arguably fall outside the inevitable-discovery doctrine is where the police were correct in their suspicion that evidence would have been destroyed had they announced their purpose, but a reviewing court nonetheless found that the record prior to entry was insufficient to support that belief. Although the entry might then theoretically be deemed the "cause" of the discovery of the not-yet-destroyed evidence, this Court's sound refusal to recognize a constitutional right to destroy evidence renders the exclusionary rule inapplicable even in that circumstance:

It may be that, if the agents had not entered the apartment, petitioners might have arranged for the removal or destruction of the evidence, and that in this sense the agents' actions could be considered the "but for" cause for discovery of the evidence. But at this juncture, we are reminded of Justice Frankfurter's warning that "[s]ophisticated argument may prove a causal connection between information obtained through [illegal conduct] and the Government's proof," and his admonition that the courts should consider whether "[a]s a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint." [Citation.] The essence of the dissent is that there is some "constitutional right" to destroy evidence. This concept defies both logic and common sense.

Segura, 468 U.S. at 816. Indeed, *Nix* itself applied the inevitable-discovery doctrine in a case where the police had failed to show that their misconduct was not willful:

> The requirement that the prosecution must prove the absence of bad faith . . . would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach.

467 U.S. at p. 445.

The same analysis is appropriate for violations of a hypothetical knock-and-announce requirement. As a threshold matter, no violation occurs if the police reasonably believe that their peril would be increased or that evidence would be destroyed if their entry were preceded by an announcement of identity and purpose. *See, e.g., Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion); *Miller v. United States*, 357 U.S. 301, 309 (1958); Pet.Br. 63. Moreover, because of the risks attendant to an unannounced entry, officers are unlikely to make one without a genuine belief that one or both of these conditions exist. Only a trivial deterrent effect could be achieved by applying the exclusionary rule to those situations where the court and the police later disagree over the reasonableness of the officers' assessment that their lives were endangered or that evidence might be destroyed.[2/] A refusal to apply the exclusionary rule in

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2. Petitioner and *amici* ACLU, et al., suggest that the knock-and-announce rule is necessary to protect "innocent" persons from being "terrorize[d]" by the

such situations does not condone the misconduct; it simply recognizes that, due to its substantial societal costs, invocation of the rule must result in "appreciable deterrence." *United States v. Janis*, 428 U.S. 433, 454 & n.28 (1976).

C. Suppression Of Evidence Seized Under A Valid Search Warrant That Is Untainted By An Unannounced Entry Does Not Further The Exclusionary Rule's Deterrence Purpose

The Court has described deterrence variously as the "prime purpose," *United States v. Calandra*, 414 U.S. 338, 347 (1974), the "primary justification," *Stone v. Powell*, 428 U.S. 465, 486 (1976), and the "'sole rational justification,'" *United States v. Janis*, 428 U.S. 433, 454 n.29 (1976), for the exclusionary rule. Underlying the theory of deterrence is an assumption that conduct in violation of the Fourth Amendment is motivated by a desire to obtain incriminating evidence for use at trial. *See New York v. Harris*, 495 U.S. 14, 20-21 (1990). Accordingly, the exclusionary rule has been invoked "to compel respect for the constitutional guaranty in the only effective way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).[3]

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police. (Pet.Br. 58-59; ACLU Br. 25-26.) The exclusionary rule, of course, provides no deterrence in such cases.

3. Although some decisions have alluded to "judicial integrity" as an additional rationale, "they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular

Under that theory, the Court has deemed the social cost of excluding relevant evidence to be necessary to deter police from efforts to coerce a confession, *Chambers v. Florida*, 309 U.S. 227 (1940), to order unjustified detentions, *Terry v. Ohio*, 392 U.S. 1 (1968), and to conduct warrantless searches, *Chimel v. California*, 395 U.S. 752, 761, 767-768 (1969). On the other hand, the Court has deemed the exclusionary rule to be a costly and counterproductive sanction where the challenged police conduct is motivated not by a desire to gather evidence, but by independent concerns, most often the protection of themselves or others. *See, e.g., New York v. Quarles*, 467 U.S. 649, 655-657 (1984); *cf. Michigan v. Summers*, 452 U.S. 692, 701-702 (1981).

A decision by police officers to execute a search warrant by means of an unannounced entry falls into the latter category. (Pet.Br. 49 ("the policy of the common law rule of announcement was to protect against violence in [un]announced police invasions of the home"), 51.) Because a warrant grants police full authority to search the premises for the listed items, an unannounced entry is not necessary to obtain evidence. Thus, police would make an unannounced entry only (1) where they believe that their safety (or the safety of others) would be endangered by a noticed entry, *see Sabbath v. United*

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context." *Stone*, 428 U.S. at 485. Judicial integrity and deterrence both focus on the need to discourage violations of the Constitution and, hence, follow "essentially the same" inquiry. *Janis*, 428 U.S. at 458-459 n.35.

States, 391 U.S. 585, 589 (1968) ("another facet of the rule of announcement was, generally, to safeguard officers"); or (2) where they believe a noticed entry would result in the destruction of evidence. As Petitioner concedes (Pet.Br. 63), either of these justifications validates an unannounced entry. *See Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion); *id.* at 47 (Brennan, J., dissenting); *Miller v. United States*, 357 U.S. 301, 309 (1958). Accordingly, the exclusionary rule is unnecessary to deter police misconduct.

Although much of police work is fraught with danger, service of warrants is particularly so. A neutral magistrate, by issuing the warrant, has already decided that evidence relating to a crime is likely to be found at a particular place. Although the officers may have some control over the timing of the search, the advantages otherwise lie with the suspects, as they are surely more familiar with the building's layout, the weapons they may have available, and the presence of others in the house. Moreover, they know their intentions, while an officer can only guess at the resolve of the suspects to fight, flee, or surrender. *See Maryland v. Buie*, 494 U.S. 325, 333 (1990); S. CHAPMAN, COPS, KILLERS AND STAYING ALIVE: THE MURDER OF POLICE OFFICERS IN AMERICA 82 (1986).

Once the officer makes known his or her purpose, the situation becomes what is termed a "fatal funnel": the suspect always knows where the officers will be (i.e., coming through the door) and need aim only at a fixed point and await a target.

> The entering officers, on the other hand, do not know the suspect's location when they enter. Typically, daylight outside will be brighter than the artificial light inside, so the officer's eyes take a period of time to adjust to the darker room. The suspect is located in a position of relative darkness, while the officers, entering a doorway with light at their backs, are silhouetted to the suspect. . . . All of these factors combine to render the police blind relative to the suspect.

Donald B. Allegro, Note, *Police Tactics, Drug Trafficking, and Gang Violence: Why The No-Knock Warrant Is An Idea Whose Time Has Come*, 64 NOTRE DAME L. REV. 552, 566 n.76 (1989).

The dangerous realities of police work have not escaped the attention of this Court, which places "great[] importance . . . in minimizing the risk of harm to the officers":

> [T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command over the situation.

Michigan v. Summers, 452 U.S. at 702-703. Consequently, Petitioner does not dispute that self-protection is a justification for an unannounced entry. Pet.Br. 63; *see, e.g., Read v. Case*, 4 Conn. 166, 170 (1822); *Ker*, 374 U.S. at 40 (1963) (plurality opinion). Of course, in this case, the police had ample cause to fear that Petitioner would greet their warrant with violence: one day earlier, Petitioner had brandished an automatic pistol and had threatened the undercover informant "with serious physical injury or death" if the informant was working for the police. J.A. 15-16, 50.

Unfortunately, it is also true that *unannounced* entries can increase the risk to the officer. "Compliance [with the federal knock-and-announce statute] is . . . a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder." *Miller*, 357 U.S. at 313 n.12 (1958). Indeed, "one of the principal objectives of the English requirement of announcement of authority and purpose was to protect the arresting officers from being shot as trespassers." *Ker*, 374 U.S. at 58 (Brennan, J., dissenting).

Maneuvering between Scylla and Charybdis requires careful consideration and balancing of the risks by an officer who views this choice not as an academic exercise, but as a matter of life and death. Unlike the evidence-gathering motives that justify the exclusion of evidence in other contexts, an officer has no improper motive to choose one method of entry over another. *State v. Valentine*, 264 Or. 54, 504 P.2d 84, 90 (1972) ("police self-interest should dissuade police from making entries in

violation of the [knock-and-announce] statute"). We should not expect that the addition of a layer of judicial oversight, with the stick of the exclusionary rule, would much alter an officer's self-preservation calculus, "unless it is to make him less willing to do his duty." *Leon*, 468 U.S. at 920; *cf. New York v. Harris*, 495 U.S. at 20-21. Deterrence would come, if at all, by increasing the risks to those sworn to protect us.

Nor is the privacy interest protected by the knock-and-announce requirement sufficiently compelling to overlook the deficiencies in the exclusionary rule's ability to deter its violation. When an officer with a warrant announces his purpose, the occupant has no discretion to refuse entry. If permission is denied or even delayed for a short period, entry may be forced. The occupant has no cognizable privacy interest in hiding or destroying evidence of a crime, *Segura*, 468 U.S. at 815-816 & n.10, or in making an escape, *see Miller*, 357 U.S. at 309. If she plans none of these and is otherwise lawfully engaged, the most the knock would possibly prevent is a broken door, which is precisely the type of harm that is readily compensable in a tort or civil rights action. All that remains of the privacy interest in the few moments between announcement and entry is the opportunity of the occupant to avoid being surprised. Without belittling this shard of privacy, it hardly seems more compelling than the privacy interest invaded by the warrantless illegal entry and nineteen-hour seizure of the apartment in *Segura* or the forcible warrantless entry of the warehouse in *Murray*.

In addition, several lower courts, in reliance on *Sabbath*, 391 U.S. at 590 n.7 (noting that entries obtained by a ruse have been viewed as not involving a "breaking") and *Lewis v. United States*, 385 U.S. 206 (1966) (validating the use of undercover agents to obtain entry into dealer's home for purchase of narcotics), have held that the police are excused from announcing their identity and purpose when they use a ruse or subterfuge to gain entry to execute a warrant. *E.g., United States v. Stevens*, 38 F.3d 167, 170 n.1 (5th Cir. 1994); *State v. Myers*, 102 Wash. 2d 548, 689 P.2d 38, 40-43 (1984). If an officer is permitted to disguise his or her identity and purpose in order to gain entry to execute a warrant, the privacy interest remaining in the knock-and-announce rule must be small indeed.

Finally, it must be remembered, as a fact of "prime importance," that the entry and the subsequent search here were authorized by a *warrant*. *Summers*, 452 U.S. at 701. A neutral and detached magistrate had found probable cause to believe that the law was being violated in Petitioner's home and had authorized a substantial invasion of the privacy of the persons who resided there. *Id.*; *see also Michigan v. Tyler*, 436 U.S. 499, 513 (1978) (Stevens, J., concurring in the judgment) ("A warrant provides authority for an unannounced, immediate entry and search").

At bottom, the knock-and-announce requirement, much like restrictions on nighttime warrants, is a tool that protects civility, not privacy. *See United States v. Tedford*, 875 F.2d 446, 450-451 (5th Cir. 1989) (refusing to suppress

evidence seized during a warrant-search executed at night in violation of Fed. R. Crim. P. 41); *United States v. Schoenheit*, 856 F.2d 74, 76-77 (8th Cir. 1988) (same); *cf. Gooding v. United States*, 416 U.S. 430, 456-457 (1977) (interpreting federal statute to require "no special showing" for a nighttime search). Accordingly, several courts have declined to exclude evidence where the police failed to comply with a knock-and-announce requirement. *E.g., State v. Westlund*, 302 Or. 225, 229-230, 729 P.2d 541, 544 (1986) ("where the purpose of a statute is something other than the protection of privacy or property rights, the sanction of denying the state the use of evidence obtained by a statutory violation will not be applied"); *People v. Lamas*, 229 Cal. App. 3d 560, 570, 282 Cal. Rptr. 296, 301-302 (1991); *United States v. Hidalgo*, 747 F. Supp. 818, 832-835 (D.Mass. 1990); *see also Albritton v. United States*, 634 So. 2d 1114, 1117-1118 (Fla.App.), *rev. denied*, 641 So.2d 1344 (1994) (refusing to suppress gun, which was seized pursuant to a warrant, for failure to knock and announce prior to breaking an outer door).

The pragmatic analysis undertaken in *Segura*, *Murray*, and *Harris* leads inexorably to the same conclusion: that the exclusionary rule's purposes would not be effectively served here.

D. Prior Cases Ordering Suppression For Non-Compliance With 18 U.S.C. § 3109 Are Inapplicable Here

In *Sabbath v. United States*, 391 U.S. 585 (1968) and *Miller v. United States*, 357 U.S. 301 (1958), the Court

ordered suppression as a sanction for the violation of 18 U.S.C. § 3109, which provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Neither *Sabbath* nor *Miller* requires or endorses suppression as a remedy here. In both cases, the Court was construing a federal statute requiring notice of authority and purpose. Having found a violation, the Court ordered suppression, under its supervisory power over the federal courts, to enforce the statute. *See Ker v. California*, 374 U.S. 23, 39 (1963) (plurality opinion); *id.* at 53 (Brennan, J., dissenting). In neither case did the Court consider whether the statute itself was required by the Constitution and, if so, what remedy was appropriate for its violation. *See Sabbath*, 391 U.S. at 591 n.8.

Here, of course, Arkansas does not have a statute equivalent to 18 U.S.C. § 3109 and, even if it did, the exclusionary rule would be an inappropriate sanction for its violation. *See California v. Greenwood*, 486 U.S. 35, 43-44 (1988) ("We have never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs"). Whether suppression

is appropriate for violation of any *constitutional* rule of announcement this Court might recognize depends on a balancing of the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity. *See id.* at 44. This pragmatic analysis differs substantially from the statutory interpretation undertaken in *Miller* and *Sabbath*, neither of which involved an entry authorized by a warrant and neither of which analyzed the appropriateness of the exclusionary sanction.

Although those issues may not have been important in fashioning a remedy for violation of a federal statute under the Court's supervisory power, they are a vital part of the inquiry under the exclusionary rule. Indeed, this Court has *never* ordered a state court to suppress evidence seized under a valid warrant. Petitioner has offered no basis for creating new law in this case.

CONCLUSION

For all of the foregoing reasons, the judgment of the Arkansas Supreme Court should be affirmed on the alternate ground that the exclusionary rule does not apply to evidence seized pursuant to a valid warrant, notwithstanding an antecedent unannounced entry.

Respectfully submitted,

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